

Chapter 90.

Arkansas Property And Casualty Insurance Guaranty Act.

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23-90-101. Title.

This chapter shall be known and may be cited as the "Arkansas Property and Casualty Insurance Guaranty Act".

23-90-102. Purpose.

This chapter is for the purpose of providing funds in addition to assets of insolvent insurers for the protection of the holders of "covered claims" as defined in § 23-90-103 through payment and through contracts of reinsurance or assumption of liabilities or of substitution or otherwise.

23-90-103. Definitions.

As used in this chapter, unless the context otherwise requires:

- (1) "Commissioner" is the Insurance Commissioner;
- (2)(A) "Covered claim" is an unpaid claim of an insured or third party liability claimant which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies, and which is issued or assumed, whereby an assumption certificate is issued to the insured, by an insurer licensed to do business in this state, in cases where the insurer becomes an insolvent insurer and the third party claimant or liability claimant or insured is a resident of this state at the time of the insured event, or the property from which the claim arises is permanently located in this state. Covered claims shall also include one hundred percent (100%) of unearned premiums up to an amount not exceeding twenty-five thousand dollars (\$25,000) per policy. Individual covered claims shall be limited to three hundred thousand dollars (\$300,000) and shall not include any amount in excess of three hundred thousand dollars (\$300,000).
- (B) A "covered claim" shall not include an unpaid claim of an insured or third party liability claimant whose net worth as of December 31 of the year next preceding the date the insurer becomes an insolvent insurer exceeds fifty million dollars (\$50,000,000); provided, that an insured's or third party liability claimant's net worth on such date shall be deemed to include the aggregate net worth of the insured or third party liability claimant and all of its affiliates as calculated on a consolidated basis.
- (C) A "covered claim" shall not include any of the following amounts:
 - (i) Any amount awarded as punitive or exemplary damages;
 - (ii) Any amount sought as return of premium under any retrospective rating plan; or
 - (iii) Any amount due to any reinsurer, insurer, insurance pool, or underwriting association as subrogation recoveries or otherwise. This subdivision (2) shall not prevent the reinsurer, insurer, insurance pool, or underwriting association from presenting the excluded claim to the insolvent insurer or the liquidator, but the claim shall not be asserted against any other person, including the person to whom benefits were paid or the insured of the insolvent insurer, except to the extent that the claim is outside the coverage provided herein or is in excess of the limits of the policy issued by the insolvent insurer.
- (D) A "covered claim" shall not include supplementary payment obligations, including, but not limited to, adjustment fees and expenses, attorney's fees and expenses, court costs, interest, and bond premiums incurred prior to the determination that an insurer is an insolvent insurer under this chapter. With respect to a covered claim for unearned premiums, persons who were residents of this state at the time the policy was issued and persons who are residents of this state at the time the company is found to be an insolvent insurer shall be considered to have covered claims under this chapter.
- (3) "Insolvent insurer" is an insurer which, after March 30, 1977, is determined to be insolvent by a court of competent jurisdiction;
- (4) "Insurer" is any person who writes any kind of insurance to which this chapter applies under § 23-90-104, including the exchange of reciprocal or inter-insurance

contracts, and is licensed to transact insurance in this state. However, this chapter shall not apply to those persons transacting business as a farmers' mutual aid association pursuant to §§ 23-73-101 - 23-73-114, and 23-73-116;

- (5) "Net direct written premiums" is the gross amount of premiums received from policies of insurance issued in this state to which this chapter applies, less return premiums and dividends paid or credited to policyholders. The term does not include premiums for indemnity reinsurance accepted from other licensed insurers, and there shall be no deductions for premiums for indemnity reinsurance ceded to other insurers;
- (6) "Payment of covered claims" is actual payment and also is utilization of funds derived from assessments for consummation of contracts of reinsurance or assumption of liabilities or contracts of substitution to provide for liabilities for covered claims; and
- (7) "Person" is any individual, corporation, partnership, association, or voluntary organization.

23-90-104. Applicability - Exceptions.

This chapter shall apply to all kinds of direct insurance written by insurers licensed to transact insurance in this state, but shall not be applicable to the following:

- (1) Life, annuity, health, or accident and health insurance;
- (2) Mortgage guaranty, financial guaranty, or other form of insurance offering protection against investment risks;
- (3) Bail bonds or appearance bonds as defined in or otherwise referenced in Arkansas Code, Title 17, Chapter 19;
- (4) Credit insurance;
- (5) Insurance of warranties or service contracts;
- (6) Title insurance;
- (7) Ocean marine insurance; and
- (8) Any transaction or combination of transactions between a person, including affiliates of the person, and an insurer, including affiliates of the insurer, which involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk.

23-90-105. Construction.

This chapter shall be liberally construed to effect the purpose under § 23-90-102 which shall constitute an aid and guide to interpretation.

23-90-106. Arkansas Property and Casualty Advisory Association - Creation - Members.

- (a) There is created by this chapter an advisory association to be known as the "Arkansas Property and Casualty Advisory Association", herein called the "advisory association" to be composed of eight (8) insurers. The Insurance Commissioner shall appoint the insurers who will serve as the initial advisory association. Subsequent members of the advisory association shall serve for terms of office of four (4) years

and shall be appointed by the commissioner for terms of four (4) years.

- (b) The members of the advisory association shall be chosen to afford fair representation to all insurers subject to this chapter giving due consideration to the various categories of premium income, geographical location, and segments of the industry represented in Arkansas.
- (c) Vacancies on the advisory association shall be filled for the remaining period of the term in the same manner as other appointments.
- (d) Members shall serve until their successors are appointed.
- (e) Members shall serve without pay but may receive expense reimbursement in accordance with § 25-16-901 et seq.

23-90-107. Arkansas Property and Casualty Advisory Association - Procedures.

- (a) The State Insurance Department shall promulgate reasonable organizational rules for the Arkansas Property and Casualty Advisory Association which shall set forth, among other things, quorum and attendance requirements for meetings, procedural rules to be followed at association meetings, and rules concerning the replacement of members.
- (b)(1) The advisory association shall conduct its meetings in Little Rock, Arkansas, in the office of the Insurance Commissioner.
 - (2) Meetings shall be held upon call by the commissioner or upon written request of a majority of the members.
 - (3) Meetings shall not be open to the public. Only members of the advisory association, the commissioner, and persons authorized by the commissioner shall attend the meetings.

23-90-108. Arkansas Property and Casualty Advisory Association - Powers and duties.

- (a)(1) The Arkansas Property and Casualty Advisory Association shall advise and counsel with the Insurance Commissioner upon matters relating to the solvency of insurers.
- (2) The commissioner may call a meeting of the advisory association when a court of competent jurisdiction determines that an insurer is insolvent and may call a meeting of the advisory association when he determines that a danger of insolvency of an insurer exists.
- (3) The advisory association shall, upon majority vote, notify the commissioner of any information indicating that an insurer may be unable or potentially unable to fulfill its contractual obligations and request a meeting with the commissioner.
- (4) At the meetings, the commissioner may divulge to the advisory association any information in his possession and any records of the State Insurance Department, including examination reports or preliminary reports from examiners relating to the insurer.
- (5) The commissioner may summon officers, directors, and employees of an insolvent insurer, or an insurer the commissioner considers to be in danger of

insolvency, to appear before the advisory association for conference or for the taking of testimony.

- (6) Members of the advisory association shall not reveal information received in the meetings to anyone unless authorized by the commissioner or when required as witness in court.
- (b) Upon request by the commissioner, the advisory association shall attend hearings before the commissioner and meet with and advise the commissioner and his representatives on matters relating to the affairs of an insolvent insurer and relating to action that may be taken by the commissioner and his representatives to best protect the interests of persons holding covered claims against an insolvent insurer and relating to the amount and timing of partial assessments, the marshalling of assets, and the processing and handling of covered claims.

23-90-109. Arkansas Property and Casualty Advisory Association - Reports and recommendations.

Reports or recommendations made by the Arkansas Property and Casualty Advisory Association to the Insurance Commissioner and his representatives shall not be considered public documents and there shall be no liability on the part of and no cause of action against a member of the advisory association or the advisory association itself for any report, individual report, recommendation, or individual recommendation by the advisory association or members to the commissioner or his representatives.

23-90-110. Arkansas Property and Casualty Advisory Association - Right of officers, directors, and employees to contract - Interested parties.

- (a) Any insurer that has an officer, director, or employee serving as a member of the Arkansas Property and Casualty Advisory Association shall not lose the right to negotiate for and enter into contracts of reinsurance or assumption of liability or contracts of substitution to provide for liabilities for covered claims with the receiver of an insolvent insurer. The entering into any contract shall not be deemed a conflict of interest.
- (b) The advisory association or any insurer assessed under this chapter shall be an interested party under § 23-68-118.

23-90-111. Covered claims - Notification to insureds of insurer's insolvency.

- (a) This chapter shall apply to covered claims existing prior to the determination that an insurer is an insolvent insurer and to covered claims arising within thirty (30) days after the determination of insolvency or before the policy expiration date if less than thirty (30) days after the determination of insolvency or before the insured replaces the policy or effects its cancellation, if he does so within thirty (30) days of the determination of insolvency.
- (b) Upon the determination by a court of competent jurisdiction that an insurer is an insolvent insurer, the Insurance Commissioner shall notify the insureds of the insolvent insurer of the determination and of their rights under this chapter. The notification shall be by mail at each insured's last known address, where available, but if sufficient information for notification by mail is not available, notice by publication

in a newspaper of general circulation printed in this state shall be sufficient.

- (c) Notwithstanding any other provisions of this chapter, a covered claim shall not include any claim filed with the guaranty fund after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

23-90-112. Estimation of amount needed to pay claims - Assessment of insurers.

- (a)(1) Whenever a court of competent jurisdiction determines that an insurer has become an insolvent insurer, the receiver appointed in accordance with §§ 23-68-101 - 23-68-113 and 23-68-115 - 23-68-132 shall promptly estimate the amount of additional funds needed to supplement the assets of the insolvent insurer and any available amounts in the fund described in § 23-90-114 which are immediately available to the receiver for the purpose of making payment of all covered claims.
- (2) Thereafter, the Insurance Commissioner shall be empowered to make such assessments as may be necessary to produce the additional funds needed to make payment of all covered claims.
- (3) The commissioner may make partial assessments as the actual need for additional funds arises for each insolvent insurer.
- (b)(1) The commissioner shall assess individual insurers in proportion to the ratio that the total net direct written premium collected in the State of Arkansas by the insurer during the preceding calendar year bears to the total net direct written premium collected by all insurers, except insolvent insurers, in the State of Arkansas for the preceding calendar year.
- (2) Assessments during a calendar year may be made up to, but not in excess of, two percent (2%) of each insurer's net direct written premium for the preceding calendar year.
- (3) If the maximum assessment in any calendar year does not provide an amount sufficient for payment of covered claims of insolvent insurers, assessments may be made in the next and successive calendar years.
- (c) Insurers determined to be insolvent insurers by a court of competent jurisdiction shall be exempt from assessment from and after the date of that determination and until the commissioner determines that the insurer is no longer an insolvent insurer.
- (d)(1) It shall be the duty of each insurer to pay the amount of its assessment to the receiver within thirty (30) days after the commissioner gives notice of the assessment, and assessments may be collected by the receiver through suits brought for that purpose.
- (2) Venue for suits shall lie in Pulaski County, Arkansas.
- (3) The receiver shall not be required to give an appeal bond in any cause arising hereunder.
- (e) Funds derived from assessments under the provisions of this chapter shall not become assets of the insolvent insurer but shall be deemed a special fund loaned to the receiver for payment of covered claims. This loan shall be repayable to the extent available from the funds of the insolvent insurer, as provided in this chapter.

23-90-113. Failure to pay assessment.

- (a) The Insurance Commissioner may suspend or revoke, after notice and hearing, the certificate of authority to transact business in this state of any insurer who fails to pay an assessment when due.
- (b) As an alternative, the commissioner may levy a fine on any member insurer which fails to pay an assessment when due. The fine shall not exceed one hundred dollars (\$100) per day.
- (c) Any insurer whose certificate of authority to do business in this state is cancelled or surrendered shall be liable for any unpaid assessments made prior to the date of such cancellation or surrender.

23-90-114. Accounting for and repayment of assessments.

- (a)(1) Upon receipt from an insurer of payment of an assessment or partial assessment, the receiver shall provide the insurer with a participation receipt which shall create a liability against the assessment fund maintained by the Insurance Commissioner.
- (2) The assessment fund from which an advance is made to an insolvent insurer for the payment of covered claims shall be regarded as a general creditor of the insolvent insurer for the amount of funds so advanced, provided that, with reference to the remaining balance of any advances received by the receiver and not expended in payment of covered claims, the claim of the assessment fund shall have preference over other general creditors.
- (3) The receiver of any insolvent insurer shall adopt accounting procedures reflecting the expenditure and use of all funds received from the assessment fund and shall make a final report of the expenditure and use of these funds to the commissioner. This final report shall set forth the remaining balance, if any, from the moneys advanced from the assessment fund.
- (4) The receiver shall also make any interim reports concerning the accounting and that may be required by the commissioner.
- (5) Upon completion of the final report and as soon after completion as is practicable, the receiver shall refund the remaining balance of the advances to the assessment fund.
- (b) Should the commissioner at any time determine that there exist moneys in the assessment fund in excess of those reasonably necessary for efficient future operation under the terms of this chapter, the commissioner shall cause the excess moneys to be returned pro rata to the holders of any participation receipts on which there is a balance outstanding after deducting any credits taken against premium taxes as authorized in § 23-90-119. If after a distribution the commissioner finds that an excess amount still exists in the fund or if there are no participation receipts on which there is an outstanding balance, the commissioner shall cause the excess amount to be deposited with the Treasurer of State for credit to the General Revenue Fund of this state.

23-90-115. Payment of covered claims.

- (a)(1) When an insurer has been determined by a court of competent jurisdiction to be an insolvent insurer, the receiver shall marshal all assets of the insolvent insurer, including, but not limited to, those which are designated as, or that constitute, reserve

assets offsetting reserve liabilities for all liabilities falling within the term covered claim as defined in § 23-90-103.

- (2) The receiver shall apply all of the assets to the payment of covered claims but may utilize funds received from assessments in the payment of claims, pending orderly liquidation or disposition of the assets.
 - (3) When all covered claims have been paid or satisfied by the receiver, any balance remaining from the liquidation or disposition of the assets shall first be applied in repayment of funds expended from assessments.
 - (4) These repayments shall be credited as remaining balances and be refunded as provided in § 23-90-114.
- (b) In addition to authorization to make actual payment of covered claims, the receiver is specifically authorized to utilize the marshalled assets and funds derived from assessments for the purpose of negotiating and consummating contracts of reinsurance or assumption of liabilities or contracts of substitution to provide for outstanding liabilities of covered claims.
- (c) This chapter shall not be construed to impose restrictions or limitations upon the authority granted or authorized the Insurance Commissioner or the receiver elsewhere in the Arkansas Insurance Code, § 23-60-101 et seq., and other statutes of this state but shall be construed and authorized for use in conjunction with other portions of the Arkansas Insurance Code, § 23-60-101 et seq., dealing with delinquency proceedings.
- (d) In any lawsuit brought by a receiver of an insolvent insurer for the purpose of recovering assets of the insolvent insurer, the fact that claims against the insolvent insurer have been or will be paid under the provisions of this chapter shall not be admissible for any purposes and shall not be placed before any jury either by evidence or argument.

23-90-116. Duties of receiver.

- (a)(1) Covered claims against an insolvent insurer placed in temporary or permanent receivership under an order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction shall be processed and acted upon by the receiver or ancillary receiver in the same manner as other claims as provided in §§ 23-68-101 - 23-68-113 and 23-68-115 - 23-68-132 and as ordered by the court in which the receivership is pending.
- (2) However, the funds received from assessments shall be liable only for the difference between the amount of the covered claims approved by the receiver and the amount of the assets marshalled by the receiver for payment to holders of covered claims, and, in ancillary receiverships in this state, funds received from assessments shall be liable only for the difference between the amount of the covered claims approved by the ancillary receiver and the amount of assets marshalled by the receivers in other states for application to payment of covered claims within this state.
- (3) Funds received from assessments shall not be liable for any amount over and above that approved by the receiver for a covered claim, and any action brought by the holder of the covered claim appealing from the receiver's action shall not increase the liability of the funds, provided that the receiver may review his action

in approving a covered claim and for just cause modify the approval at any time during the pendency of the receivership.

- (b)(1) If a receiver is appointed to handle the affairs of an insolvent insurer, the receiver shall determine whether or not covered claims should or can be provided for in whole or in part by reinsurance, assumption, or substitution.
- (2)(A) Upon determination by the receiver that actual payment of covered claims should be made, the receiver shall give notice of the determination to claimants falling within the class of covered claims.
- (B) The receiver shall mail the notice to the latest address reflected in the records of the insolvent insurer.
- (C) If the records of the insolvent insurer do not reflect the address of a claimant, the receiver may give notice by publication in a newspaper of general circulation.
- (D) This notice shall state the time within which the claimant must file his claim with the receiver, which time shall in no event be less than ninety (90) days from the date of the mailing or publication of the notice.
- (3) The receiver may require, in whole or in part, that sworn claim forms be filed and may require that additional information or evidence be filed as may be reasonably necessary for the receiver to determine the legality or the amount due under a covered claim.
- (c)(1) Upon determination by the receiver that actual payment of covered claims should be made or upon order of the court to the receiver to give notice for the filing of claims, any person who has a cause of action against an insured of the insolvent insurer under a liability insurance policy issued or assumed by the insurer, if the cause of action meets the definition of covered claim, shall have the right to file a claim with the receiver regardless of the fact that the claim may be contingent, and this claim may be approved as a covered claim if:
 - (A) It may be reasonably inferred from the proof presented upon the claim that the person would be able to obtain a judgment upon the cause of action against the insured;
 - (B) The person furnishes suitable proof that no further valid claims against the insurer arising out of his cause of action other than those already presented can be made; and
 - (C) The total liability of the insurer to all claimants arising out of the same act of its insured is no greater than its total liability would be were it not in liquidation, rehabilitation, or conservation.
- (2) In the proceedings of considering covered claims, no judgment against an insured taken after the date of the commencement of the delinquency proceedings or the appointment of a receiver shall be considered as evidence of liability or of the amount of damages, and no judgment against an insured taken by default or by collusion prior to the commencement of the delinquency proceedings or the appointment of a receiver shall be considered as conclusive evidence either of the liability of the insured to the person upon the cause of action or of the amount of damages to which the person is therein entitled.
- (d) The acceptance of payment from the receiver by the holder of a covered claim or the

acceptance of the benefits of contracts negotiated by the receiver providing for reinsurance or assumption of liabilities or for substitution shall constitute an assignment to the insolvent insurer of any cause of action or right of the holder of the covered claim arising from the occurrence upon which the covered claim is based. The assignment shall be to the extent of the amount accepted or the value of the benefits provided by the contracts of reinsurance or assumption of liabilities or substitution.

23-90-117. Right of recovery.

- (a)(1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer, which is also a covered claim, shall be required to exhaust first his right under the policy.
- (2) Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under the insurance policy.
- (b)(1) Any person having a claim or legal right of recovery under any governmental insurance or guaranty program which is also a covered claim shall be required to exhaust first his right under the program. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under the program.
- (2) Any person having a claim which may be recovered under more than one (1) insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured, except that if it is a first-party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property. If it is a workers' compensation claim, he shall seek recovery first from the association of the residence of the claimant.
- (3) Any recovery under this chapter shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

23-90-118. Issuance of new or renewal policies.

- (a) An insolvent insurer placed in receivership for which assessments have been made under the provisions of this chapter shall not be authorized, upon release from receivership, to issue new or renewal insurance policies until such time as the insolvent insurer has repaid in full the entire amount advanced to it from the assessment fund set out in § 23-90-114. However, the Insurance Commissioner, upon application of the Arkansas Property and Casualty Advisory Association and after hearing, may permit the issuance of new policies in accordance with a plan of operations by the released insurer for repayment of the advances.
- (b) The commissioner may, in approving the plan, place such restrictions upon the issuance of new or renewal policies as he deems necessary to the implementation of the plan.
- (c) The commissioner shall give ten (10) days' notice of the hearing to the insurers to whom the participation receipts were issued for an assessment made for the benefit of the released insurer. The holders of the receipts shall be entitled to appear at and participate in the hearing.

23-90-119. Assessment as credit against taxes.

- (a) Any assessment paid by an insurer under this chapter shall be allowed to an insurer as a credit against its premium tax payable under §§ 26-57-601 - 26-57-605 and 26-57-607.
- (b) The tax credit referred to in this section shall be allowed at a rate of twenty percent (20%) per year for five (5) successive years following the date of assessment.
- (c) The balance of any assessment paid by the insurer and not claimed as a tax credit may be reflected in the books and records of the insurer as an admitted asset of the insurer for all purposes, including exhibition in the annual statements.
- (d) However, any insurer which neglects to take the twenty percent (20%) credit during the year allowable will not be allowed to carry over the credit for the following year or years.

23-90-120. Liability of insurer, commissioner, etc.

There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer subject to this chapter or its agents or employees, the Arkansas Property and Casualty Advisory Association, or the Insurance Commissioner or his representatives for any action by them in the performance of their powers and duties under this chapter.

23-90-121. Certain advertisements, announcements, and statements prohibited - Exception.

- (a) No person, including an insurer, agent, or affiliate of an insurer shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in any newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio station or television station, or in other ways, any advertisement, announcement, or statement which uses the existence of the Arkansas Property and Casualty Advisory Association of this state for the purpose of sales, solicitation, or inducement to purchase any form of insurance covered by this chapter.
- (b) However, this section shall not apply to the advisory association or to any other entity which does not sell or solicit insurance.

23-90-122. Rules and regulations.

The State Insurance Department is authorized and directed to issue such reasonable rules and regulations as may be necessary to carry out the various purposes and provisions of this chapter, and in augmentation thereof.

23-90-123. Appeal of orders.

Any order of the Insurance Commissioner under this chapter may be appealed as provided by § 23-61-307.